A similar analysis applies to Schoenbohm's Rule 29 motion of September 21, 1992, made almost five months after the jury was discharged. It was in this motion that Schoenbohm first asserted that the government had failed to prove use of a "counterfeit" access device, as contrasted with an "unauthorized" one. Because of the motion's untimeliness, we decline to review the district court's disposition of the arguments that Schoenbohm made therein.

V.

Schoenbohm contends that the district court failed to use the appropriate standard in ruling on his motions for a new trial. When a defendant argues that a government witness testified falsely at trial, a new trial must be granted if:

> 1. The court is reasonably well satisfied that the testimony given by a material witness is false;

---

1. (...continued)

> day requirement of Rule 29. . . . Here, although the district court entered a judgment of acquittal on [the defendant's] motion for acquittal, and not sua sponte, it would be inconsistent to hold that the court's inherent power to grant an acquittal out of time sua sponte does not extend to those occasions when a motion is made in granted. Accordingly, [the defendant's] acquittal cannot be reversed for such a procedural deficiency, and we must now consider the merits of the appeal.

This case, however, is distinguishable from Coleman in that the district court never granted Schoenbohm's motion for acquittal -- there was no exercise of "the court's inherent power to grant an acquittal out of time" which we can review.

> 2. That without it a jury might have reached a different conclusion; [and]
>
> 3. That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973).

Instead of using this so-called Larrison test, Schoenbohm says, the district court applied a sufficiency of the evidence standard. On denying Schoenbohm's first motion for a new trial, the district judge stated: "I am denying the motion because looking at the evidence as I must in the light most favorable to the Government, I find that there was sufficient evidence for the jury to have returned a verdict of guilty." On denying Schoenbohm's second motion for a new trial, the district judge noted: "[T]he use of [Exhibit] 5B, while giving the court some thought overall, I cannot say that given all the other evidence in the case that it would have denied the defendant a fair trial."

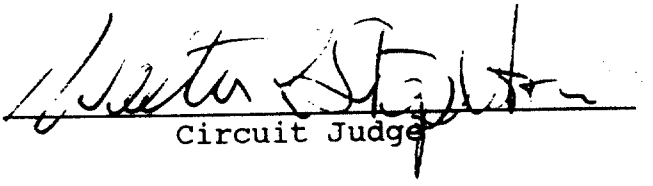
Application of the Larrison test does not help Schoenbohm. Even if Exhibit 5B had not been introduced, there is still no possibility that "the jury might have reached a different conclusion" on Count I because Exhibit 5B was not relevant to Count I.

VI.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.



Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7516

UNITED STATES OF AMERICA

v.

HERBERT L. SCHOENBOHM

Appellant

SUR PETITION FOR PANEL REHEARING

BEFORE: STAPLETON, ALITO and WEIS, Circuit Judges

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for panel rehearing, the petition for panel rehearing is denied.

By the Court,

Circuit Judge

Dated: NOV 0 2 1994

RECEIVED AND FILED
11-2-94 PM
P. DOUGLAS STEK,

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	
HERBERT L. SCHOENBOHM	:	NO. 91-108

ORDER

AND NOW, this 28th day of February, 1995, upon consideration of defendant's motion to vacate conviction pursuant to F.R.Crim.P. 52(a) and (b), and the memoranda and other materials submitted in support of the motion, it is ORDERED:

That the motion is DENIED, because the issues raised by this motion have previously been decided by the United States Court of Appeals for the Third Circuit, in affirming defendant's conviction.

Sr.J.

3/15/95

cc: U.S.A.
Mr Schoenbohm
Atty: Jacobs

CERTIFIED A TRUE COPY THIS
28 DAY OF March 1995
ORINN F. ARNOLD
CLERK OF THE COURT
DEPUTY

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7516

UNITED STATES OF AMERICA

v.

HERBERT L. SCHOENBOHM,

Appellant

Appeal from the United States District Court
For the District of the Virgin Islands
(D.C. Crim. No. 91-00108)
District Judge: Honorable Anne E. Thompson

Argued April 18, 1994

BEFORE: STAPLETON, ALITO and WEIS, Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States District Court for the District of the Virgin Islands and was argued on April 18, 1994,

On consideration whereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of the district court entered July 12, 1993, be and the same is hereby affirmed.

ATTEST:

P. Douglas Sisk

Clerk

Dated: JUL 22 1994

Certified as a true copy and issued in lieu
of a formal mandate on November 10, 1994.

Teste: P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.